arbitration a question of law is squarely brought before the Supreme Court of Pennsylvania, it will follow the opinion of Justice Sharswood and refuse to give validity to such an agreement.[12]

G. F. D.

COURTS—JURISDICTION IN MOOT CASES—While the general principle that courts should refuse to assume jurisdiction in moot cases has long been recognized,[1] little attention has been given to the formulation of rules for determining whether or not a given case is moot within the rule. This is due perhaps to the fact that the refusal of the court to assume jurisdiction in such a case is entirely discretionary, there being no legal prohibition against the decision of such an issue, and also to the further circumstance that the very nature of the subject necessitates to a great extent the decision of each case upon its peculiar facts, and to some degree minimizes the value of precedent. The courts have, however, in the absence of any legal obligation, refrained from deciding such cases with remarkable uniformity, and from their opinions a few general principles may be collected.

At the beginning, moot cases fall into two natural classes. The first class includes those cases in which the situation upon which the court is asked to give an opinion is a purely fictitious or hypothetical one, in the sense that it at no time existed in actuality. In the second group are those cases where facts raising an issue entirely proper for decision existed when the suit was commenced, but where it appears, upon the decision of the case on appeal, that by the alteration or discontinuance of the situation upon which the issue was founded, the case, once real, has become moot.

Under the first group are those cases in which a mere colorable dispute is created between parties whose interests are not adverse, to obtain the opinion of the court upon a question of law which it is to their interest to know,[2] and also those in which an issue equally fictitious is based upon an assumed breach of an existing contract or an assumed contest of a will.[3] While it has been urged in such cases that the instrument as an existing document should be construed it seems clear that so long as the issue itself is fictitious the fact that documents upon which it is based may have

[12] This was so held by the Circuit Court for the Eastern District of Pennsylvania in Mitchell v. Dougherty, 90 Fed. 639 (1898).

[1] Cox v. Phillips, Lee Temp. Hardwicke 237 (1736); Lord v. Veazie, 8 How. 251 (U. S. 1850).

[2] Smith v. Junction Rwy. Co., 29 Ind. 546 (1868).

[3] Collins v. Collins, 19 Ohio St. 468 (1869), the court refused to construe a will where no trust was involved. In New Orleans, *etc.*, Rwy. v. Linehan Ferry Co., 104 La. 53 (1900), the court refused to construe a contract until an actual issue should arise.

a physical and not merely a hypothetical existence cannot be material. In such cases a construction of the document is uniformly refused.

Often the public interest attached to a particular question would seem to constitute a persuasive argument to justify its decision, but even in such cases jurisdiction is declined. In a recent case before the Supreme Court of the United States [4] the constitutional authority of the Secretary of War to make an order that upon any declaration of war the members of the national guard might be directed by the President to proceed to any point whether within or without the United States, was questioned. An issue would hardly arise in the matter until such an emergency as would make the remedy of judicial determination inappropriate. The court held that it could not be compelled to construe such orders for the members "notwithstanding their laudable feeling of deep interest in the general subject," and declined to give an opinion.[5]

There is a class of cases often objected to as moot without success, which, although they are clearly not to be considered moot cases, show very plainly the line of demarcation between a moot question and a real issue. Where a statute lays down a rule or prescribes a penalty, especially where the penalty is payable to the party aggrieved, a person often places himself in a position to invite its violation to make a "test case" or to obtain financial enrichment. A not uncommon form of such a statute is one providing a penalty for charging excessive fares. Whether the courts allow or refuse recovery under such a statute in the case of a person who becomes a passenger for the sole purpose of receiving pecuniary advantage from an anticipated violation,[6] such refusal or allowance is based upon considerations of public policy and statutory construction, and not upon the ground that the question is moot. These cases emphasize the true criterion for determining the existence of a moot question, namely, the presence or absence of an adverse interest. Wherever there exists, as in this latter type of cases, an interest truly adverse on the part of the claimant, the question cannot be objected to as moot.

[4] Lieutenant-Colonel Stearns v. Brigadier-General Wood, 236 U. S. 75 (1915).

[5] Many unique and interesting cases arise under this head. In Bardon v. Phila. Rapid Transit Co., 22 D. R. 942 (Pa. 1914), the counsel for the plaintiff, after a verdict in his favor, sought to contest the trial court's refusal to grant a general exception to its charge, by an appeal. The court dismissed the case without decision as purely academic.

[6] In Nicholson v. New York City Rwy. Co., 118 App. Div. 858 (N. Y. 1907), recovery was denied under these facts. In Adams v. Union R. R. Co., 21 R. I. 124 (1899), recovery was allowed. The New York case denied recovery, not because the question was moot, but because they held, as a matter of statutory construction, that the statute was intended to apply to *bona fide* passengers only.

In the second type of moot cases where a situation giving rise to an actual issue has at one time existed, but where the actuality of the situation has been removed by events intervening during the pendency of an appeal, the general tendency of the appellate courts is to treat the case as though it had been fictitious *ab initio* and to refuse to entertain jurisdiction.[7] It seems obvious that in the ordinary case the fact that it has became moot before it reaches the appellate court clearly justifies the refusal to take jurisdiction and that such cases are not to be distinguished in principle from those in which the issue has been at all times fictitious.

It may well become material, however, in determining whether when a case has been argued before the appellate court and where between the argument and the decision by that court the question becomes moot,[8] the court should refuse to give a decision. This depends largely upon the fundamental reason for which jurisdiction in moot cases is declined. If, as is generally stated, the ground is that the court's time should be devoted to the determination of actual controversies and not wasted in the consideration of hypothetical cases, the case should even under these circumstances be dismissed. If, on the other hand, the reason is that a moot case is likely to be argued and considered less thoroughly or that if collusively brought, the presentation of the merits of one side may purposely be made inadequate, thereby paving the way for the establishment of unsound and dangerous precedents, the latter objection at least is absent where the case has not until after the conclusion of the argument become moot. In *Burkett* v. *Dunlap*,[9] where this precise situation was presented, the court, while emphasizing the fact that parties could not, by a settlement after argument, deprive the court of its right to decide the question if it so desired, said that of the alternate courses the dismissal of the appeal was to be preferred.

Familiar instances of this type of moot cases are those involving the validity of elections where the dismissal of an appeal on the ground that the question has become moot often leaves unredressed what has been a valid grievance. In *James* v. *Montague*,[10] a voter sought to enjoin the canvassing of the votes at a certain election, alleging that the section of the Virginia constitution under

[7] In Faust v. Cairns, 242 Pa. 15 (1913), where a quarantine was removed while an appeal from a refusal to enjoin it was pending, the appeal was dismissed. See also Cutcomp v. Utt, 60 Ia. 156 (1882); Cheong Ah May v. United States, 113 U. S. 216 (1885). So also where a permit, the refusal of which has been appealed, would have expired. Security Life Ins. Co. v. Prewitt, 200 U. S. 446 (1905).

[8] Where it appears in the course of the argument that the case has become moot, the appeal will be dismissed. Bucks Stove Company v. American Federation of Labor, 219 U. S. 581 (1910).

[9] 72 S. E. 65 (Ga. 1911).

[10] 194 U. S. 147 (1903).

which it was held was void in that it was aimed at the disenfranchisement of colored voters. The petition was dismissed by the Circuit Court and when the case reached the Supreme Court on appeal the candidates elected were already in the House of Representatives. The court said that the thing sought to be prohibited had been done and could not be undone by the court, and refused to take jurisdiction.[11]

Under the second type of moot questions situations frequently occur which may justify the application of different principles. Thus it may be that although pending the appeal the question has become moot due to intervening circumstances, the abatement or cessation of the alleged illegal situation is of dubious or uncertain permanency. Such a situation is well illustrated in *United States* v. *Hamburg-American Company,*[12] a recent decision by the Supreme Court. A suit had been commenced by the United States against certain steamship companies in 1911 for an alleged violation of the Anti-Trust Act of 1890. The Supreme Court took judicial notice of the European war as a result of which the question had become moot, and refused to entertain jurisdiction. The case of *United States* v. *Prince Line,*[13] decided a year earlier in a district court, where under facts practically identical with those of the principal case the court assumed jurisdiction, was expressly disapproved. In that case the court after admitting that the war had necessitated a dissolution of the alleged illegal agreement and "turned this investigation into an autopsy instead of a determination of live issues," proceeded to decide the controversy on its merits.

It was urged in the principal case that in view of the probability that at the cessation of war the alleged illegal combination would be resumed, there should be a determination of the case on its merits to preclude such an attempt. In *United States* v. *Trans-Missouri Freight Association,*[14] a bill to dissolve an association alleged to be illegal having been dismissed by the lower courts,

[11] See also Richardson v. McChesney, 218 U. S. 487 (1910). In Washington an exception to the general rule is made in the case of suits to enjoin certain contracts for public work. Thus the court refused to dismiss an appeal from an order denying an injunction forbidding public officials from making a contract for public work, even though the city had pending the appeal made compliance with the injunction impossible by entering into such a contract, under which the work had actually been performed. Graff v. City of Tacoma, 112 Pac. 250 (Wash. 1910); Green v. O'Kanogan County, 111 Pac. 226 (Wash. 1910). It has been held in one case that satisfaction of a judgment entered against the appellant after his appeal had been perfected but before hearing, did not justify the dismissal of the appeal without his consent. Arnold v. Pike, 143 N. W. 662 (Wis. 1913). This case appears clearly *contra* to the general view.

[12] 36 Sup. Ct. Rep. 212 (1916); 239 U. S. 446.

[13] 220 Fed. 230 (1915).

[14] 166 U. S. 290 (1896).

before the argument on an appeal to the Supreme Court the association dissolved voluntarily, and when the case came before the appellate court it was urged that it was then moot. The court held that it was not by this voluntary dissolution deprived of the right to determine the rights of the parties and restrain future violations. The court in the principal case distinguished it from this earlier decision on the ground that in the earlier case the dissolution was purely voluntary and nothing prevented an immediate resumption of the illegal combination, while in the latter case the dissolution was due to events wholly beyond the control of the parties.

That the court in the Freight Association case made an exception to the general rule in certain of the second type of moot cases and assumed jurisdiction in a case purely moot, is undeniable, and the soundness of the exception is beyond question.[15] To hold that a defendant combination which had succeeded in the court below could dissolve the old association and immediately form a new one pending the appeal and thereby practically oust the jurisdiction of the Supreme Court by rendering every appeal moot would be such an obvious travesty on justice that there is little wonder that it was not countenanced.

It is suggested, however, that to predicate a further distinction upon the involuntary character of the dissolution is more questionable. From the standpoint of the persons aggrieved by the alleged illegal combination, whether it be the public or an individual, the permanency of the interrupting influence and not its involuntary nature is the material consideration. While it is true that a cause such as war is beyond the control of the defendants, there is no more assurance of the permanency of the interruption in that case than in the case of voluntary dissolution. An early termination of the war would permit a resumption of the arrangement complained of in the same manner as though the dissolution had been a voluntary act. The concern of the injured party is not whether the dissolution is voluntary or involuntary, but whether there is for any reason an assurance that it will not be resumed.

Having once crossed the line and properly taken jurisdiction in this class of cases, the true criterion for the assumption of jurisdiction should, it is submitted, lie in the probable permanency of the cessation, and not in the voluntary or involuntary character of the dissolving cause.

B. M. K.

[15] Another apparent exception is made in the case of orders of the Interstate Commerce Commission, which are "continuing" in their nature. It has been held that the mere fact that the period of their validity under the statute has expired pending the appeal, will not prevent the assumption of jurisdiction. Southern Pac. Terminal Co. v. I. C. C., 219 U. S. 498 (1910).